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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EARLY STRONG, Plaintiff and Appellant, v. BLUE CROSS OF CALIFORNIA, Defendant and Respondent.	B232708 (Los Angeles County Super. Ct. No. BC382405)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Affirmed.

Knapp, Petersen & Clarke, Andre E. Jardini and Maria A. Grover; Law Offices of Michael S. Duberchin, Michael S. Duberchin; Law Offices of Alan R. Burman, Alan R. Burman, for Plaintiff and Appellant.

Seyfarth Shaw, Gilmore F. Diekmann, Jr., Jeffrey A. Wortman, Dennis S. Hyun, Kenneth D. Sulzer, James M. Harris, and Jill A. Porcaro, for Defendant and Respondent.

In this employment discrimination case, Early Strong appeals from a summary judgment in favor of respondent Blue Cross of California (Blue Cross). We conclude that Strong has not raised a triable issue of material fact on her causes of action for employment discrimination, retaliation and race-based harassment under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq., (FEHA)). The judgment is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

Strong, an African-American woman, has worked at the Aranda Center of Blue Cross, in Woodland Hills, California, since 1998. She was hired as an Examiner II at $12.00 an hour. A year later, her position was changed to Customer Care Associate II with a base pay of $12.85 an hour. In 2000 and 2001, she advanced to Customer Care Associate III and then to Senior Customer Care Associate with a base pay of $15.10 and $16.94 an hour, respectively. In 2003, Strong applied for an open position and was promoted to Lead Customer Care Associate with a base pay of $22.61 an hour. In 2005, she transferred to the Provider Accounts Receivable (AR) unit without a pay rate change. Her job title changed to Lead Client Services Associate and then to Customer Care Lead-Multi. She received regular merit pay increases over these years, and by early 2006, she was earning $28.16 an hour.

In 2006 and 2007, Strong applied for 54 open positions but received no promotions.[1] She began complaining to the Human Resources (HR) department of Blue Cross in April 2006, and filed a complaint with the Equal Employment Opportunity Commission (EEOC) in December 2006.

In January 2006, AR manager Catherine Mednick did not allow Strong to work overtime at her own desk, and did not allow her to permanently change her shift to 6:00 a.m. to 2:00 p.m. At some point, Strong told Mednick she would complain to HR,

[1] We discuss the promotion process at Blue Cross and the positions relevant to this appeal later in this opinion.

and Mednick responded Strong would regret it. In October 2006, Strong complained to HR that Mednick had pushed her during a pumpkin carving contest. Subsequently, she also complained that Mednick harassed her, and discriminated and retaliated against her by, among other things, taking work away from her and giving her an unfavorable performance review. The HR investigator found no workplace harassment or violation of company policy. Mednick was counseled to refrain from touching associates.

Mednick's 2006 evaluation of Strong included allegations that could not be substantiated. Strong's performance score was revised by director Roberta Mayhew, who took over the AR unit after Mednick's position was eliminated during a reorganization. Mayhew told Strong she needed to get over the past and stop going to HR with complaints of discrimination if she wanted to promote into management. With regard to her EEOC complaint, Mayhew told Strong not to put her eggs in one basket.

After she took over, Mayhew placed the entire AR unit on an audit. She also reclassified the lead employees, including Strong, as Senior Claims Representatives. The lead employees in other units were not reclassified. Since Strong already earned more than the maximum pay for the reclassified position, she did not receive merit increases for the next two years. She was still occasionally asked to perform lead duties and was an acting lead for a period of time without a change in job title or pay.

In November 2006, Strong received an e-mail titled "Prom Day in the Hood," which contained disparaging depictions of African-Americans. The Blue Cross employees who forwarded the e-mail were issued final corrective actions, the last step before termination. Also at work, Strong received a spam e-mail titled "ghetto," which contained an unintelligible narrative about paranormal activity and urged the purchase of shares in a company. She was advised to send it to the company's spam filter, and the Information Technology (IT) department was asked to block e-mails from the external address. In April 2007, a co-worker asked Strong why she did not wash her hair every day and complained to her that Black people's houses were dirty. Strong did not report these comments at the time.

In December 2007, Strong sued Blue Cross, its parent company, the WellPoint Companies, Inc. (WellPoint), and Mednick. After the lawsuit was filed, Strong was promoted to an Operation Expert Multi position with a base pay of $30.59 an hour. In a discussion of the upcoming 2008 presidential election, a co-worker suggested Strong should go back to Africa if she was not happy in the United States. A manager told her to ignore the comment.

Strong dismissed WellPoint and Mednick and the causes of action for battery and intentional infliction of emotional distress. The remaining causes of action against Blue Cross, as stated in the operative amended complaint, are for employment discrimination, harassment and retaliation under FEHA, and for unfair business practices under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Blue Cross moved for summary judgment or summary adjudication in 2009. The hearing on the motion was continued so that the court could first rule on the class allegations in the complaint.[2] The court granted the summary judgment motion and entered judgment in favor of Blue Cross.

Strong filed this timely appeal.

DISCUSSION

A motion for summary judgment requires the court to determine whether the entire action lacks merit. (Code Civ. Pro. § 437c, subd. (a).) The burdens of the parties to such a motion are as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] . . . [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and

[2] The order denying class certification is subject to a separate appeal, in case No. B231512.

the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850–851, fns. omitted.)

We review the trial court's ruling on a motion for summary judgment de novo, viewing the evidence in the light most favorable to the opposing party. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499.) We consider all of the evidence offered by the parties in connection with the motion, except that which the court properly excluded. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Where the trial court does not expressly rule on specific evidentiary objections, the objections are presumed overruled and preserved on appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.)[3]

I

In cases of intentional discrimination based on circumstantial evidence, California follows the burden-shifting test established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) At trial, the employee bears the initial burden to establish a prima facie case of discrimination by showing that: "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Id*. at p. 355.) The burden then shifts to the employer to produce admissible evidence that its action was taken for a legitimate, nondiscriminatory reason. (*Id*. at pp. 355–356.) If that is done, the employee must then show that the employer's proffered reason is a pretext for discrimination. (*Id*. at p. 356.)

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[3] The court ruled only on evidentiary objections that the parties presented orally during the hearing on the motion for summary judgment. It did not rule on many of their written objections. Neither party challenges the court's evidentiary rulings on appeal, but Strong repeatedly cites evidence to which the court sustained evidentiary objections.

Pretext may be shown either directly with evidence '"'"that a discriminatory reason more likely motivated the employer"'"' or indirectly with evidence that '"'"the employer's proffered explanation is unworthy of credence."'"' (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68 (*Morgan*).) It is insufficient to show "the employer's decision was wrong, mistaken, or unwise." (*Id*. at p. 75.) The employer's proffered legitimate reasons must be so weak, implausible, inconsistent, incoherent, or contradictory "that a reasonable factfinder could rationally find them 'unworthy of credence,'" in order to infer that the employer's decision was not based on them. (*Ibid*.)

An employer satisfies its burden on summary judgment by producing admissible evidence showing the employee cannot establish a prima facie case. (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 216 (*Addy*).) Alternatively, if the employer's motion is based on a showing of its nondiscriminatory reasons for the challenged action, the employer satisfies its burden by producing evidence of such nondiscriminatory reasons, and the employee must then produce evidence raising a triable issue of material fact that intentional discrimination occurred. (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097–1098, citing *Guz, supra*, 24 Cal.4th at p. 357.) Circumstantial evidence that the employer's reason was untrue or pretextual must be "specific" and "substantial," not speculative. (*Morgan, supra*, 88 Cal.App.4th at p. 69; *Horn v. Cushman & Wakefield Western* (1999) 72 Cal.App.4th 798, 807; see also *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 396 (*McRae*) [employee's theory, speculation or personal belief unsupported by competent evidence is not substantial evidence of pretext].)

"Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.] Accordingly, the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions,

the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz*, *supra*, 24 Cal.4th at p. 361.)

A. Failure to Promote

In her opposition to the motion for summary judgment, Strong stated that she was not contesting the promotional decisions as to approximately 20 of the 54 positions to which she applied. In her opening brief on appeal, she reviews the record evidence as to eight positions and touches briefly on a few others. Yet, in her reply brief, Strong insists she has not abandoned her challenge to other positions. We review only arguments that are actually briefed and supported by record citations and consider all other arguments forfeited. (See *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 [appellant forfeits claim of error by failing to cite to record]; *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1345 & fn. 6 [appellant forfeits issue by failing to raise it in opening brief].)

The promotions at issue in this case come out of an application process that begins when a hiring manager submits a requisition form to the HR's Talent Acquisition Department. The hiring manager works with a recruiter (also referred to as a talent consultant) to come up with a job description, minimum qualifications, and questions to be used in scoring applicants. The recruiter posts the position, screens the applications, and depending on the manager's preference, forwards all applications meeting the minimum qualifications, or only those of the more qualified candidates. The hiring manager decides whom to interview and hire for the job.

Blue Cross claims generally that the hiring managers either did not know or did not consider Strong's race in making promotion decisions. Strong claims in turn that the hiring managers either had met her or could ascertain her race by looking up her picture on the company's website. Even assuming hiring managers knew or could find out Strong was African-American, the question still is whether the failure to promote her was due to her race or to legitimate nondiscriminatory reasons.

1. Promotions Denied Based on Qualifications

Blue Cross contends that Strong was not qualified for some of the positions to which she applied and thus cannot establish a prima facie case of discrimination. (See *Guz, supra,* 24 Cal.4th at p. 354.) Alternatively, it argues that the decision not to promote her to a position was legitimate if she was not the most qualified candidate for that position.

A prima facie case based on a failure to promote requires showing that the plaintiff '"applied and was qualified for a job for which the employer was seeking applicants,"' and that '"despite his qualifications, he was rejected."' (*Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 675–676.) In *Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666 (*Reeves*), a case that required a comparison of the plaintiff's qualifications to those of the successful candidate, the court concluded that the disparity in qualifications must be substantial in order to support an inference of discrimination. (*Id*. at p. 675) "'If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.' [Citation.]" (*Id*. at pp. 674.)

We conclude that no triable issue of material fact exists as to positions challenged on appeal based on Strong's qualifications.

a. Job 1: Managing Account Consultant—Req. No. 15091[4]

This was the first position for which Strong applied in 2006. It required management of accounts with regard to sale, enrollment, consultative and administrative support. The required qualifications were "[d]emonstrated track record of Account

[4] The parties follow the numbering of positions in Blue Cross's job posting chart. The positions are identified by job title and requisition number.

Management success with service or sales of insurance products to commercial accounts," and five or six years of account management experience.

Strong scored 65 percent on her prescreening questionnaire, and her application was forwarded to the hiring manager, Deedra Moffat. According to her answers, she had "4-5 years" of account management or support experience, but no experience with individual, small group, mid-market, large group, or national accounts. She answered that she had experience conducting open enrollment meetings, but her resume did not list such experience with Blue Cross or her previous employer. Strong believes she was qualified because she worked with "individuals in the Large Group Sales department," but she does not state that her own work involved sales. Her subjective views of her own qualifications cannot raise a triable issue of material fact. (*Morgan, supra,* 88 Cal.App.4th at p. 76.) Strong's resume left the hiring manager with the impression that her experience was with accounts receivable rather than sales.

Strong claims Nicole Jurcic, the successful applicant for this position, had less health care experience and had worked only a month in account management and sales. While this appears to be true, it does not establish that Jurcic was less qualified than Strong. Jurcic had been with Blue Cross since 2000. She had been a speaker for open enrollment between 2003 and 2005 when she was a Lead Customer Care Associate in Public Entities. As a lead in the "Champion's Workshop" Training Department, she had trained new hires on all Blue Cross products and had developed training materials. As Manager of the Large Group Operations "Champion's Workshop" Training Unit, she already was working with Blue Cross's sales offices and the "First Impressions Group" for new business.

Based on their applications, Strong's qualifications cannot "reasonably be viewed as "'vastly superior'"" to Jurcic's. (*Reeves, supra,* 186 Cal.App.4th at p. 677.) Strong relies heavily on her subjective perception that, once hired, Jurcic was incapable of competently performing her job because she made mistakes and asked Strong to do research for her. As we have observed, Strong's subjective views, whether of her own qualifications or those of other candidates, cannot raise an issue of material fact. (See

Morgan, *supra*, 88 Cal.App.4th at p. 76.) Additionally, Blue Cross's stated reason for not promoting Strong to this position need not have been wise or correct, so long as it was nondiscriminatory. (See *Guz*, *supra*, 24 Cal.4th at p. 358.) Strong's evidence does not establish that this decision was discriminatory.

b. Job 4: Manager I Customer Care Multi—Req. No. 16147

Among the required qualifications for this position were "3-5 years in claims, customer service or operations experience. . . . Minimum of one year in professional leadership role." Strong contends management experience was not required because it was not a listed qualification. Both the job description and prescreening questionnaire make it clear that management experience was required for this position.

The prescreening questionnaire asked how many years of supervisory and management experience the applicant had. Strong answered she had "none." She also answered she was currently in a management position, she had recent experience in performance and associate satisfaction management, and she managed 15 to 25 associates. Based on these answers, she scored 40 percent on the questionnaire. Other than showing that she was a lead, Strong's resume did not corroborate her answer that she had actual management duties.

In contrast, the successful applicant, Aravah Hoffman, answered that she had more than three years of supervisorial experience, and more than five years of management experience. She was currently in a management position and managed more than 25 associates. She scored 70 percent on the questionnaire. Her resume showed she had supervised a Blue Cross Provider Contact Center of 35 staff associates since 2000.

Based on her prescreening score, Strong cannot establish that she met the minimum qualifications for this position, or even if she did, that her qualifications must "reasonably be viewed as '"vastly superior"'" to Hoffman's. (*Reeves*, *supra*, 186 Cal.App.4th at p. 677.) Strong represents that she had to train and assist Hoffman after Hoffman became her manager. As with Strong's perception of Jurcic's performance, her perception that Hoffman was incompetent because she needed assistance does not raise an issue of material fact. We discuss later Strong's argument that, since Mednick was the

hiring manager for this position, Blue Cross's proffered reason for not promoting Strong was pretextual.

c. Job 7: Manager II Customer Care Multi—Req. No. 17542

Strong's application to this position was screened out by recruiter Ebony Jones and was not sent to the hiring manager, Dinah Jenkins, who was seeking candidates with management background. Two candidates were hired, each with years of management experience. Strong does not argue she was qualified, let alone the best qualified candidate, for this higher-level management position. She states only that one of the hired candidates, Sonya Childers, was a lead before she was promoted into management. The trial court sustained Blue Cross's objection to this statement. Even were it admissible, the statement refers to a promotion in Childers's past employment history without providing the circumstances of that promotion. There is no dispute that, when she applied to the Manager II Customer Care Multi position, Childers already had years of management experience and that Strong lacked such experience.

d. Job 17: User Applications Analyst I or II—Req. No. 17059[5]

This position required a minimum of 18 months of prior medical claims processing experience, and in particular, prior experience as a claims examiner or adjuster. On the prescreening questionnaire, Stacy Morrera, the successful candidate, and Strong each answered that she had prior experience as a claims adjuster or examiner and had prior customer service experience. Morrera's resume showed she had been a Claims Associate II between 1999 and 2002 and was "[p]roficien[t] in processing institutional claims." She was a Claims Associate III between 2002 and 2003. During this time, she "[p]rovide[d] resolution of claims and adjustments regarding benefits, policies and contracts" and was "[a]ble to process Medicare and COB." Between 2003 and 2004, Morrera was a Senior Claims Associate. During this time, she keyed and processed claims of all product types, audited new associates' claims for accuracy, and adjusted claims. Strong's resume stated she had been a Lead Customer Care Associate between

[5] Blue Cross's brief on appeal conflates job 17 with job 26, which we discuss later.

1998 and 2005, during which time one of her duties was to "[k]ey, process, and/or adjust [h]ealth claims."

In her deposition, Strong testified that job 17 was requisitioned by hiring manager Jenkins, but the job posting lists hiring manager A. McPheeters and recruiter Jones. The record contains no declarations by either McPheeters or Jones, and Jenkins's declaration does not address job 17. The position is briefly discussed in the declaration of recruiter Emily Barnes, who states that the selected candidate had five years of prior claims adjusting experience, while Strong's resume did not show any such experience. The trial court sustained Strong's objections to other parts of Barnes's declaration for lack of personal knowledge and foundation, but there was no objection to the part of the declaration on which Blue Cross relied with regard to job 17. In the absence of an evidentiary objection, Barnes's discussion of job 17 is admissible. (See Code Civ. Proc., § 437c, subd. (b)(5) ["Evidentiary objections not made at the hearing shall be deemed waived"].)

In its separate statement, Blue Cross relied on Barnes's declaration as evidence that Strong was not qualified for job 17 and that there was a legitimate nondiscriminatory reason for promoting Morrera. Strong's only response was that her resume listed over eight years of processing and adjustment experience. The only explicit reference to such experience in the resume appears in the phrase "[k]ey, process, and/or adjust [h]ealth claims." The conjunctive-disjunctive expression "and/or" used in this phrase has long been recognized as lending itself "as much to ambiguity as to brevity." (*In re Bell* (1942) 19 Cal.2d 488, 499.) Interpreted in the light most favorable to Strong, it only establishes that Blue Cross was mistaken in concluding that Strong had no claims adjusting experience, but not that its '"'"explanation is unworthy of credence."'"' (See *Morgan, supra*, 88 Cal.App.4th at p. 68.)

In her opening brief on appeal, Strong claims she had more experience than Morrera, had assisted Morrera with processing claims, and had corrected her mistakes on the request of acting manager Gilbert Soto. Based on her own declaration and deposition testimony, Strong argues that, even though she was more qualified for job 17 than

Morrera, hiring manager Jenkins did not interview her. On its face, Morrera's resume is more responsive to the requirements for this position, and Strong fails to show that the qualifications listed in her own resume must "reasonably be viewed as "'vastly superior'"" to Morrera's. (*Reeves*, *supra*, 186 Cal.App.4th at p. 677.) Nor does she show that Morrera's alleged shortcomings or Strong's qualifications were independently known to the hiring manager or the recruiter for job 17.

As we have noted, the record does not support Strong's belief that Jenkins was the hiring manager for this position. Even accepting Strong's claim that hiring manager Amanda McPheeters reported to Jenkins, there is no evidence that Jenkins had any involvement in hiring for this position. Nor is it reasonable to infer in the absence of additional evidence that, since Strong unsuccessfully applied for more than one position in Jenkins's department, the failure to promote her was racially motivated.

The record does not indicate who made the decision not to hire Strong for job 17. The exhibits referenced in the Barnes declaration include a tracking record of Strong's application, which indicates that Strong was rejected on April 28, 2006, a day after she applied. Next to this event appears the notation, "[r]equisition has been canceled," which, unlike other notations, is not listed as made by a recruiter or a hiring manager, but rather appears to have been generated by "[s]ystem." Morrera's tracking record, in turn, indicates that she applied on May 10, 2006, and recruiter Jones shared her application with the hiring manager on May 15, 2006. The record contains no evidence regarding this position in the intervening two weeks between April 28 and May 10.

After we asked the parties to address these exhibits at oral argument, Strong's counsel argued that the rejection of Strong's application for job 17 was suspicious in light of the entire record, which includes other canceled positions. But while the notation on Strong's tracking record for job 17 may support an inference that her application was rejected because the requisition was canceled, neither side advanced this theory in the trial court. We decline to pursue it further. As we discuss in more detail later in this opinion, an inference that requisitions were intentionally canceled just because Strong applied would be speculative on the record before us.

e. Job 21: Network Management Analyst—Req. No. 17942

This position involved negotiating contracts with physicians and providers. It required "[a]dvanced negotiations skills and extensive knowledge of provider reimbursement methodologies." Preferred was "3-5 years experience in provider reimbursement methodologies."

On her prescreening questionnaire, Strong answered she did not have substantial contracting or reimbursement negotiation skills, and she admitted she never had been given an opportunity to work in these areas. She claimed to have less than one year of contract negotiation experience. As an example of her experience, she mentioned only that a settlement had been reached in an arbitration, based on her "research and claims pricing knowledge."

Recruiter Andre Pile did not forward her application to hiring manager Julie Bietsch because Strong did not have advanced contracting and negotiation skills. In contrast, the successful candidate, Valesca Weerasinghe, had negotiated contracts and rate reimbursements for hospitals, medical groups, and physicians. Although Weerasinghe responded that she had no contract negotiation experience, she clarified that she interpreted the question as referring only to "vendor contracting." Her answers to other questions and her resume showed she had been involved in negotiating contracts with hospitals, medical groups, and buyers at least since 2002.

Strong cannot establish that she met the minimum qualifications for this position, or that her qualifications can "reasonably be viewed as "'vastly superior"'" to Weerasinghe's. (*Reeves*, *supra*, 186 Cal.App.4th at p. 677.)

f. Job 40: Senior System Analyst—Req. No. 23098

Strong references job 40 in passing in the discussion portion of her opening brief as an example of Blue Cross's violation of its own hiring policies. The position required supporting and maintaining information systems and software. The necessary qualification was "3-5 years of experience with client server or mainframe software development & testing." The person hired had many years of system analyst experience. Recruiter Chantale Canal-Stewart concluded Strong did not meet the minimum

qualifications for this position and did not forward her application to the hiring manager, Karen Vogel. The recruiter explained that while Strong may have used some of the relevant software, she did not have experience in developing software programs.

Strong insists that some Blue Cross employees are hired without any technical experience. The trial court sustained an objection to this statement in her declaration. On appeal, Strong cites to the e-mail on which her statement was partly based. The author of the e-mail told Strong he got his job as a Business Systems Analyst II in the STAR/WGS Claims Systems Projects without having any technical background in systems. He also told her that his position involved "claims processing, adjusting and how benefits are applied." Assuming this e-mail is admissible, it shows only that its author, like Strong, was a user of software, not a software developer. There is no evidence that Blue Cross hires software developers without technical experience.

2. *Position Denied Based on Lesser Pay (Job 26: User Application Analyst I or II—Req. No. 20902)*

In the trial court, Blue Cross argued that Strong cannot establish a prima facie case for failure to promote her to positions with equal or lesser pay. It identified six such positions. On appeal, Strong discusses only one. Blue Cross argues that the decision not to offer Strong a pay reduction was not a pretext for discrimination.

On the prescreening questionnaire for job 26, Strong scored higher than the successful candidate, Wendy Musselman. Recruiter Barnes explains Strong was not considered for this position because her pay ($59,000 a year) was more than the maximum budgeted base pay for the position ($34,160 to $51,240). Strong challenges this explanation because pay was also an issue for Musselman, who earned $53,055.20. Strong claims that this position would have allowed her to advance because Musselman eventually was promoted to "Benefit Application Analyst Sr." with an annual salary of $80,592. The latter statement is unsupported by evidence in the record, and the trial court sustained Blue Cross's oral objection to it. The court also sustained an objection to Strong's view of the racial demographics of the department to which she sought a promotion.

"'[A] plaintiff who is made to undertake or who is denied a lateral transfer—that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury unless there are some other materially adverse consequences . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm. Mere idiosyncrasies of personal preference are not sufficient to state an injury.' [Citation.]" (*McRae*, *supra*, 142 Cal.App.4th at p. 393.) In *Addy*, *supra*, 44 Cal.App.4th 205, the court affirmed a summary judgment for an employer on a failure to promote claim. The employer submitted admissible evidence demonstrating that the position was not a promotion for the plaintiff because it had "the same advancement potential as the job she currently occupied, and it paid less than she was earning . . . ." (*Id*. at p. 216.) The court also held this was one of several legitimate, nondiscriminatory reasons for not considering the plaintiff for the position. (*Ibid*.)

Blue Cross offered evidence that the maximum pay for the User Application Analyst position was significantly below Strong's pay range. Strong does not dispute this, and the record indicates she withdrew her application from consideration for another position that had a budgeted pay of $50,485 a year because she considered it a demotion. But Strong contends that job 26 would have been a promotional opportunity, despite the lesser pay, because Musselman, the successful candidate, eventually advanced to a higher paying position. On appeal, she cites to the personnel record of a Wendy Gwiazda, who in 2009 had the job title "Benefit Application Analyst Sr." Even were we to assume this is Musselman's record, it shows neither the salary nor the promotion path to this position.

At the end of 2006, when she applied for job 26, Strong was a lead in her department. According to her, the next job family level was Manager I. Since she was denied several management positions for which she applied through the job posting process, Strong concludes she was in a dead-end job. But there is another promotional process at Blue Cross, called career progression advancement, where a position is given to an employee who has developed sufficient skill to move to a higher level within a job family. Strong herself received such advancements in 2000 and 2001. In her declaration, she stated other managers had told her that they "were just given the management jobs."

The trial court sustained Blue Cross's objection to this statement. Even were it admissible, it does not show how these managers got their positions.

Strong has not raised an issue of material fact that job 26, despite its significantly lower base pay, had a greater advancement potential than her own position and should be considered a promotion for purposes of her prima facie case.

3. Canceled Positions

To establish a prima facie case of discrimination based on failure to promote, Strong has to show that, after she was rejected, '"the position remained open and the employer continued to seek applicants from persons of [her] qualifications."' (*Perez v. County of Santa Clara*, *supra*, 111 Cal.App.4th at p. 676.) Blue Cross argues she cannot establish this element as to canceled positions. In the trial court, it identified 17 such positions. Strong did not challenge all of them. On appeal, she discusses in some detail six canceled positions, and notes that other positions were canceled within days after she applied. She contends that the sheer number of cancellations brings into question Blue Cross's justification for them, allowing an inference that openings were canceled deliberately to prevent her from obtaining certain positions.

The cancellation of a position may prevent a plaintiff from establishing a prima facie case unless the position was canceled for discriminatory reasons. (See *Moore v. Abbott Laboratories* (S.D.Ohio 2011) 780 F.Supp.2d 600, 613, and cases cited.)[6] Additional evidence is needed to support an inference of discriminatory intent in such a case. For example, in *Terry v. Gallegos* (W.D.Tenn. 1996) 926 F.Supp. 679, an EEOC official admitted that he repeatedly canceled vacancies to avoid filling them with an eligible white male candidate. (*Id*. at pp. 709–710.) And in *Storey v. City of Sparta Police Dept.* (M.D.Tenn. 1987) 667 F.Supp. 1164, city officials, who had exhibited gender bias in other ways, instituted a hiring freeze when they realized that they would have to hire a female police officer. (*Id*. at pp. 1169–1170.)

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[6] The similar objectives of state and federal employment laws allow California courts to look to pertinent federal precedent when applying state law. (*Guz*, *supra*, 24 Cal.4th at p. 354.)

Because cancellations, by themselves, are not necessarily evidence of discrimination, the question is whether Strong has offered other evidence of discriminatory intent as to positions that were canceled. We conclude that she has not.

a. Job 2: Manager II Grievance/Appeals—Req. No. 15395; Job 12: Manager I Grievance/Appeals—Req. No. 17564; Job 25: Lead Grievance and Appeals Representative—Reg. No. 21220

The Manager II position was canceled because the recruiter, Sandra Yaffe, had failed to post the specific job requirements that hiring manager Ron McGinnis, in the department of PPO Grievance and Appeals, had requested. Yaffe advised Strong she was more suited to a Manager I position, and suggested that the Manager II position would be reposted as Manager I. Yaffe then posted a Manager I position. But that position was requested by manager Kathleen A. Campbell in a different department, that of Grievance and Appeals Administration–LG. The position was eliminated in a reorganization.

In her declaration, Strong represented that Campbell further downgraded the position to that of Lead Grievance and Appeals Representative. This representation is not supported by the requisition form upon which Strong relies. The form shows that the lead position was in Grievance and Appeals Clinical–HMO. The recruiter was Barnes, and the hiring manager was Theresa Peterson. The position was canceled because the department manager, who is not identified by name, did not want to hire a lead. The position was downgraded and filled as a career advancement.

Strong maintains that the Manager I position was given to Victor Madero, who was then promoted to Manager II. She also claims Madero was not qualified although she admitted having no first-hand knowledge of his qualifications. As we have explained, the Manager I position was canceled, and the subsequent job postings were requested by hiring managers in different areas of grievance and appeals. The record does not support the inference that the same position was repeatedly canceled, reposted, and internally filled to avoid promoting Strong. Nor is there evidence that the cancellations affected Strong any differently than they affected other applicants.

b. Job 6: Reimbursement Implement Specialist—Req. No. 16870

The position was posted by recruiter Barnes for manager Mailin Ho in the Network Analysis & Informatics department. Strong was one of two finalists for the position and was interviewed by Vice President Beck Yang in May 2006. In June, she was told that more candidates were being interviewed. According to Ho, funding for the position was in question, and the requisition was canceled in October 2006. Strong acknowledges she was informed that the CFO of Individual/Small Group Services, Clare Resnick, had canceled the position.

In an e-mail, Strong claimed Ho told her that the position was canceled because the department no longer needed a Reimbursement Implement Specialist. Instead, Ho filled two other positions: Data Management Specialist II and Health Information Consultant Senior. Ho told Strong she was not considered for the Data Management Specialist II position because she did not have contract experience. Strong asserts there was no material difference between the Reimbursement Implement Specialist position, which was canceled, and the Data Management Specialist II position, which was filled. But the job descriptions show that the former would have involved maintenance of provider and reimbursement information while the latter involved management of "the hospital contract implementation process." Strong does not argue she had experience with that process. Thus, even though Ho originated both requisitions, it has not been shown that she simply reposted the Reimbursement Implement Specialist position under a different job title.

Strong argues that Blue Cross violated its own policy by considering candidates for this position over several months, but the only policy she references is that a job posting must be kept open for at least five days. She does not cite a company policy limiting the maximum period over which a job opening may be posted or prohibiting the consideration of applicants over a longer period. Additionally, since the position was ultimately canceled, the fact that other applicants were also interviewed for it suggests that Strong was not the only finalist for this position who was adversely affected by its cancellation.

c. Jobs 11 and 27: Data Analyst II—Req. Nos. 19748 and 21907

Strong's application to the Data Analyst II—Req. No. 19748 position was rejected by recruiter Jae Chang. The position was canceled and reposted with different qualifications as Data Analyst II—Req. No. 21907 to attract more qualified candidates. The recruiter shared Strong's application with hiring manager Rose Garcia. Strong was interviewed for the position two days before it was canceled due to organizational changes. Once again, there is no evidence that Strong was the only finalist for the canceled position.

Relying on testimony that positions are not posted until funding for them is approved, Strong argues that cancellations for lack of funding may be a pretext for discrimination. This may be a reasonable inference where other evidence suggests the cancellation was pretextual. But there is no such evidence here. To the contrary, there is evidence that even positions which Strong does not challenge were placed on hold due to a hiring freeze and required additional approval. Neither the hiring manager nor the recruiter appears to have control over the funding for a position. Thus, the fact that funding is initially approved does not render cancellations for lack of funding inherently suspect.

In the case of positions not filled because requisitions were canceled for lack of funding or other business reasons, there is no evidence that these cancellations affected Strong differently than they did other applicants so as to raise an inference of a racial bias against her. The sheer number of persons involved in postings and cancellations also militates against inferring a discriminatory intent without additional evidence. As we explain next, Strong has offered none, other than her own belief that everyone involved in the promotion process is biased against African-Americans. Under these circumstances, an inference of discrimination would be speculative.

B. Other Evidence of Discrimination

Strong contends that statistical and direct evidence of discrimination raises issues of material fact regarding Blue Cross's decisions not to promote her. That evidence is not properly before us. We disagree with Strong's additional contention that

circumstantial evidence of alleged discrimination by Mednick and Mayhew raises an inference that Blue Cross's stated legitimate reasons for not promoting Strong were pretextual.

1. Statistical Evidence

In her opposition to Blue Cross's motion for summary judgment, Strong referenced the August 2009 declaration of her expert Dr. Mark R. Killingsworth. The declaration purported to refute statistical analysis of promotional decisions at the Aranda Center conducted by Dr. Daniel A. Biddle, the Blue Cross expert. Dr. Killingsworth noted only that African-Americans at the Aranda Center were significantly underrepresented in upper-level positions, and he reserved the right to amend his declaration if the data on which Dr. Biddle relied was produced in discovery. In October 2010, Dr. Killingsworth signed another declaration, which included his statistical analysis of promotional data at the Aranda Center. Strong filed it in relation to her motion for class certification, and the court considered it at the class certification hearing, which took place one day before the first hearing on the summary judgment motion.

We provisionally allowed Strong to augment the record on appeal in this case with Dr. Killingsworth's 2010 declaration, subject to argument that it should not be considered. Our review on appeal from a summary judgment is limited to "the evidence set forth in the moving and opposition papers . . . ." (*Guz*, *supra*, 24 Cal.4th at p. 334.) Dr. Killingsworth's 2010 declaration is not set out in any of the parties' papers filed in relation to the motion for summary judgment, and we have been cited to no evidence that the trial court was asked to consider it, or did consider it, in relation to that motion. We, therefore, decline to consider it on this appeal.

2. Time-Barred Actions

According to Strong, her title in 1999 changed to Customer Care Associate III, but her manager, Jonathan Lane, demoted her to Customer Care Associate II. He also made comments to her about living in the "hood" and asked her if her child's father was "a gang banger." When she complained, Lane was removed from his managerial position. In 2000, Strong received a suspension and a final written warning for providing

unauthorized assistance to an associate during a call from a provider, giving incorrect information to the caller, shaking her finger at the associate in a subsequent investigative meeting, and refusing to stop when asked to do so.

Strong uses Lane's 1999 comments, in combination with Mayhew's 2007 comment that she should not put all her eggs in one basket and the comments of a co-worker in the same year, as evidence of a pervasive culture of racism. She compares the discipline she received in 2000 with the lack of any significant discipline to Mednick for allegedly pushing her in 2006. She argues she was demoted both in 1999 and 2007, and Lane's comments show the first demotion was motivated by his racism.

The FEHA limitation period is one year. (Gov. Code, § 12960.) The continuing violation doctrine is an exception to this limitation period, but it does not apply to ""the occurrence of isolated, intermittent acts of discrimination"" that do not form ""a persistent, on-going pattern." [Citation.]" (*Morgan, supra*, 88 Cal.App.4th at p. 64.) Strong does not address the FEHA limitation period or explain how incidents occurring at least six years apart can form a persistent on-going pattern of discrimination or be evidence of a pervasive culture of racism. Since the 1999 and 2000 employment actions are time barred, we decline to consider them on this appeal. We see no evidence that the individuals involved in these time-barred actions were in any way involved in the 2006-2007 promotion decisions Strong challenges. (See *Morgan*, *supra*, 88 Cal.App.4th at pp. 70–71, 79–80.)

3. Claims against Mednick and Mayhew

Strong contends that actions and statements she attributes to Mednick and Mayhew are circumstantial evidence of pretext as to all promotion decisions. But there is no evidence that Mayhew was involved in any promotion decisions for positions to which Strong applied. Nor is there evidence indicating that Mednick was involved in any promotion decision that Strong challenges on appeal,[7] except for job 4, which we already

[7] In reply, Strong argues, based on her deposition testimony, that she had to inform her manager when she applied for positions, but she cites no evidence that Mednick interfered with any of her applications. Our review of the record indicates Strong

have discussed. We therefore consider only whether Mednick's involvement as a hiring manager renders Blue Cross's stated reason for not considering Strong for job 4 pretextual.

Mednick's declaration does not affirmatively state that the recruiter, rather than she, screened Strong out. But at the time job 4 was filled on April 3, 2006, Strong had not yet complained to HR or engaged in any other protected activity to support an inference of a retaliatory motive. Nor does the evidence support an inference of racial bias.

Mednick had been Strong's manager since August 2005. The only allegedly adverse actions by Mednick that Strong clearly dates to the period before April 2006 were Mednick's not allowing Strong to work overtime at her desk and not allowing Strong to permanently change her schedule. Strong offers no evidence that other employees were treated more favorably with respect to overtime, and the trial court sustained Blue Cross's objection to Strong's claim that other employees were allowed to work earlier shifts permanently. The exhibit on which the latter claim is based is an undated and otherwise unidentified list of seven individuals in the "Provider AR/NCN Coordination Team" and their work hours. There is no indication that the list reflects the permanent schedules of employees in the AR unit at the time Mednick allegedly denied Strong's request to change her schedule. There also is no evidence that this was an adverse employment action since Mednick approved Strong's subsequent requests for shift changes and time off. The evidence does not support an inference that, at the time

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testified that Mednick told her she would call Moffat, the hiring manager for job 1, which we discussed earlier, to recommend Strong for the job. We see no evidence that Mednick did call Moffat, and it is unclear how calling to recommend Strong for a job could be circumstantial evidence of discrimination. Strong also testified Mednick gave her a poor recommendation for job 29: Recovery Representative I—Req. No. 22807. Job 29 was filled in February 2007, and the recruiter's notes do not name Mednick as the manager who gave Strong the poor recommendation for this position. Since Strong has not briefed job 29 on appeal, we do not consider this evidence further.

the Manager I Customer Care Multi position was filled, Mednick discriminated or retaliated against Strong.

The record shows that the working relationship between Mednick and Strong worsened over the course of 2006, culminating in the alleged pushing incident in October 2006 and Mednick's poor performance review of Strong for that year. But the additional inference that Mednick disliked Strong because of her race is speculative. The threat that Strong would regret it if she reported Mednick to HR does not necessarily support an inference of a racial bias. Nor does Strong's claim that in July 2006 Mednick did not allow her to be a co-lead on a Diversity Ambassador Committee. Strong's e-mail correspondence with Hoffman about this incident shows only that Hoffman was under the incorrect impression Strong would need to volunteer too many hours, and she told Mednick so.

Strong also claims that Mednick did not allow her to attend arbitration hearings because only managers were to attend such hearings; yet, other non-managerial employees were allowed to do so. But, according to Mednick, the new policy applied only to the AR unit, and there is no evidence that Mednick allowed any non-managerial employees from that unit to attend arbitration hearings. Additionally, Strong's complaint to HR that Mednick took work away from her "and others" does not support the inference that Mednick singled Strong out for disparate treatment.

Strong argues that Blue Cross's investigation of the pushing incident was biased since the HR investigator was reportedly "perceived" to be a friend of Mednick's. It is unclear whether this perception had any basis in fact, and whether Mednick pushed Strong was disputed. The investigator chose to credit Mednick's and other witnesses' account that Mednick placed her hands on Strong's shoulders and escorted her out of a cubicle where ballots were counted during a pumpkin carving contest, after Strong had repeatedly stopped by to check on the progress of counting the ballots. Based on this version of the incident, the investigator found no harassment or workplace violence, and Mednick was only counseled not to touch associates. Strong argues Mednick was not disciplined as severely as she had been, for shaking her finger at an employee in 2000.

As we explained above, any employment action taken against Strong in 2000 is not an issue on this appeal, and the record evidence regarding the 2000 incident suggests Strong's discipline at the time was based on more than her shaking a finger in another employee's face.

C. Conclusion

Blue Cross met its burden of production either by showing Strong cannot establish a prima facie case of employment discrimination or by providing a legitimate reason for promoting another candidate. Strong has not offered substantial evidence that Blue Cross's proffered reasons are unworthy of credence or a pretext for discrimination. On the evidence before us, we conclude that there is no triable issue of material fact, and Blue Cross was entitled to summary adjudication of the employment discrimination cause of action.

II

Retaliation claims under FEHA are subject to the same burden-shifting analysis as discrimination claims. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) The employee first must establish a prima facie case of retaliation by showing "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.]" (*Ibid*.) The employer then must offer a legitimate, nonretaliatory reason for the adverse employment action. (*Ibid*.) If it does, the employee must prove intentional retaliation. (*Ibid*.)

A protected activity occurs when an employee complains about conduct reasonably believed to be discriminatory, even if it later is determined not to be prohibited under FEHA. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1043.) Adverse employment actions are acts of retaliation that, whether individually or collectively, materially affect the terms, conditions, or privileges of employment. This includes "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Id*. at p. 1054.) A causal link may be established by evidence of the employer's knowledge that

the employee engaged in a protected activity and the proximity in time between that activity and the allegedly retaliatory employment action. (*Morgan*, *supra*, 88 Cal.App.4th at p. 69.) Temporal proximity of a few months may be sufficient. (See *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 478.)

In response to Blue Cross's separate statement, Strong stated that her retaliation claim was based on several acts by Hoffman, Mednick, and Mayhew, and on Blue Cross's general failure to promote her.[8]

A. Protected Conduct

Strong first complained about not receiving promotions in April 2006. Her April 13, 2006 e-mail to HR does not indicate that she complained of race discrimination; rather, it states she would like to understand the recruiting process better. In August and September 2006, Strong again complained to HR. She also spoke to an EEOC consultant at Blue Cross and met with WellPoint's ombudswoman. At that point, she claimed she was not promoted because of her race. Beginning on October 31, 2006 and in subsequent e-mails and conversations, Strong complained to HR that Mednick harassed her, and discriminated and retaliated against her. Specifically, she claimed Mednick pushed her, took work away from her, rated her poorly, and denied her request for training. Mednick was under investigation until December 2006. Also in December, Strong filed a complaint with the EEOC.

All of Strong's complaints after August 2006 were protected conduct. But many of the promotion decisions were already made by then, and as to subsequent decisions that she challenges on appeal, there is no evidence the decision makers were aware of her complaints.

Similarly, there is no evidence Hoffman knew about them. The only allegation against her is that she accused Strong of altering a work assignment to make it appear that it was completed. The September 2006 e-mail from Hoffman, while not a model of

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[8] This response to Blue Cross's separate statement also stated that the retaliation claim was based on harassment by Mednick. As we explain later, other responses effectively withdrew these allegations of harassment.

clarity, shows that Hoffman was genuinely confused whether notations Strong made on a file indicated that the file was processed or still pending. Strong's characterization of this e-mail as accusing her of falsifying an assignment is not justified.

B. Mednick's Actions

Some of Mednick's actions clearly predated any protected activity by Strong and thus cannot be causally connected to it. For example, Strong claims Mednick denied her overtime and a permanent shift change "[i]n or around January 2006." Other allegations against Mednick are not dated and are not tied to any particular protected action. Examples are Strong's broad claim that Mednick took away her duties from January 2006 to April 2007, and the claim that at some unspecified point Mednick threatened Strong that if she complained to HR, she would regret it.

The evidence indicates that Mednick knew of Strong's complaints against her and of HR's investigation by early December 2006 at the latest. Strong's response to Blue Cross's separate statement alleged one act attributable to Mednick after this time period: that Mednick included false statements in Strong's 2006
evaluation. The evaluation covers the entire year 2006, and Strong states she received it in March 2007. In her declaration, Mednick does not claim she was unaware of Strong's complaints; she only states that they did not play any role in her rating of Strong or comments about her.

Even if a causal connection exists between Strong's complaints and Mednick's evaluation, the only adverse effect of the evaluation that Strong identified in response to Blue Cross's separate statement was that it prevented her from receiving a merit increase in 2007. But as Blue Cross noted, Strong's declaration, which was cited for this proposition, did not attribute the failure to receive the increase to Mednick's evaluation. Furthermore, it is undisputed that the evaluation was corrected by Mayhew. An unfavorable evaluation qualifies as an adverse employment action only where the employer wrongfully uses it "to substantially and materially change the terms and conditions of employment . . . ." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1457.) Since there is no evidence that Mednick's evaluation had any such effect on

Strong's employment, it cannot be an adverse employment action.[9] In sum, Strong has not shown she can establish a prima facie retaliation claim as to Mednick.

C. Mayhew's Actions

Mayhew took over Mednick's units after Mednick's position was eliminated in a reorganization in January 2007. Strong claims that, in March, Mayhew reclassified her to a lower pay grade and placed her on an audit. Also in March, Mayhew reportedly told Strong that complaining to HR about discrimination was no way to promote into management and that she should be happy she still had a job.

Mayhew states that she decided to place the entire AR unit on an audit when she took it over from Mednick. She decided to reclassify the lead employees in the unit in February 2007. She claims she was not aware that Strong had filed a complaint with the EEOC. But on February 5, 2007, both Mednick and Mayhew were advised of the potential for further legal action by Strong in an e-mail calling for document preservation. Viewed in a light most favorable to Strong, this e-mail is sufficient to raise an issue of material fact whether Mednick was aware of Strong's EEOC complaint after February 5, 2007. There also may be an issue of material fact whether the decision to reclassify the lead employees in the AR unit and place them on an audit was made after that date.

In order to establish a prima facie claim of retaliation, Strong must show that the reclassification and audit were adverse employment actions. Strong claims Mayhew told her she was placed on a 100 percent audit. But Mayhew placed the whole AR unit on an audit, and there is no evidence that Strong was audited more than others. Nor is there evidence that the audit affected the terms and conditions of Strong's employment since she acknowledges that errors found during the audit were removed from her file between April and September 2007, after which the audit ended. That the audit may have bruised

[9] The same is true for Strong's claims that, in an e-mail sent to the entire unit in December 2006, Mednick criticized her text entry on a claim, and that in January 2007, Mednick wrote her up for unauthorized time off, but the write-up was later removed by HR.

Strong's ego is not sufficient. (See *Yanowitz, supra,* 36 Cal.4th at p. 1054, fn. 13 [collected cases].)

On the other hand, there is evidence supporting Strong's claim that, as a result of her reclassification from Lead Customer Care Associate Multi to Senior Claims Examiner, her job grade level decreased. Her pay was above the maximum pay for the position to which she was reclassified, and she did not receive merit increases for two years.[10] Thus, there is an issue of fact whether the reclassification imposed an economic detriment on her and therefore was an adverse employment action. (See *Yanowitz, supra,* 36 Cal.4th at p. 1052.) Strong argues further that, after she was reclassified, she was repeatedly asked to perform lead duties without a change in title or pay. She does not claim, however, that these additional duties "adversely and materially" affected her job performance or opportunity for advancement. (See *id*. at p. 1054.) On the contrary, the fact that she performed lead duties tends to undercut her argument that the reclassification affected her ability to apply for promotions that required leadership experience.

Assuming that Strong can make a prima facie case of retaliation as to the reclassification, Blue Cross has met its burden of providing a legitimate nondiscriminatory reason for it. In her declaration, Mayhew explains that, as part of a company-wide reorganization that also eliminated Mednick's position, Mayhew decided to reclassify all Lead Client Service Associates in the AR unit, including Strong, as Senior Claims Representatives because they performed claims rather than lead functions. She did not reclassify leads in other units who performed lead functions or employees who performed only claims or customer service functions.

In her response to Blue Cross's separate statement, Strong did not identify any evidence that Mayhew's decision to reclassify her was pretextual. She simply restated the evidence that supported her prima facie case and argued that because the reclassification affected her differently than other employees, it must have been

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[10] At her deposition, Strong testified she was entitled to and eventually received a "lump sum." Neither party explains the import of this testimony.

pretextual. Strong's opening brief on appeal does not present any argument on pretext in the discussion of the retaliation cause of action; Blue Cross argues that the issue has been forfeited. While the statement of facts in the opening brief is clearly argumentative, it does not substitute for a proper argument with citations to the record on the issue of pretext. We, therefore, may consider it forfeited. (See *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1345 & fn. 6 [appellant forfeits issue by failing to raise it in opening brief]; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 [record citations in statement of facts do not cure failure to include record citations in argument portion of brief].)

To the extent we can glean an argument about pretext from Strong's opposition in the trial court and her briefs on appeal, it appears that she relies on the claim that other reclassified employees told her they received merit increases, while she did not. The trial court sustained Blue Cross's evidentiary objection to this claim. Even were that evidence admissible, it does not show that the other employees were at Strong's pay level when they were reclassified and nevertheless received merit increases. Thus, it does not support the inference that Strong was singled out due to her EEOC complaint.

Strong also relies on Mayhew's comment in response to Strong's mention of her EEOC complaint—that she should not place all her eggs in one basket. We have not found a citation to this comment in the statements of material fact on this issue filed in the trial court and may disregard it. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1266–1267.) Nor is it shown that the comment, if it occurred, reflects a retaliatory animus since, according to Strong, it was made at a meeting during which Mayhew corrected Mednick's evaluation of Strong and increased her rating. (Cf., e.g., *Coghlan v. American Seafoods Co. LLC* (9th Cir. 2005) 413 F.3d 1090, 1096–1097 [strong inference of lack of bias arises where decision maker has shown willingness to treat plaintiff favorably].) The fact that another manager present at the meeting giggled when Strong retorted that she actually had two baskets does not raise an issue of fact as to Mayhew's own attitude and motives.

Strong has not shown that she can establish a prima facie case of retaliation based on any action other than her reclassification by Mayhew, and as to that, she has not shown that Mayhew's reason for it was pretextual. Blue Cross was entitled to summary adjudication of the retaliation cause of action.

III

The elements of a prima facie case of harassment are that an employer harassed the employee on the basis of race, and the harassment was sufficiently severe or pervasive to alter the conditions of employment. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465.) "[H]arassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 706.)

To be pervasive, "harassment cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 131.) A single racial epithet by a supervisor may be severe enough to constitute harassment. (*Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36 (*Dee*).) But an employer is not liable for co-worker harassment if it takes prompt, reasonable and efficacious remedial action. (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1185.)

In her response to Blue Cross's separate statement, Strong stated that her harassment claim was based on allegations that she received emails with racial epithets, was subjected to racial comments by her superiors, and was assaulted by her manager. Later in the same response, she stated that her harassment claim was not based on being pushed by Mednick. Based on these responses, Blue Cross argues that Strong has withdrawn most of her allegations of harassment. Strong does not dispute this conclusion, and her argument about harassment focuses on objectionable e-mails and statements by co-workers. Inconsistently, she also suggests that issues of fact exist

regarding harassment based on her treatment by managers, such as Lane, Hoffman, Mayhew, and especially Mednick.

As limited by her responses to Blue Cross's separate statement, Strong's harassment claim is based on "racial comments by superiors," rather than on co-worker comments or managers' actions. We already have explained that the comments made by Lane in 1999 are not properly before us (see *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812, 823), and Strong has not identified any race-based comment made by a manager during the FEHA limitation period. Mayhew's comment that Strong should not put all her eggs in one basket, even if it was made in reference to Strong's EEOC complaint, is not a racial slur or epithet severe enough to alter her conditions of employment. (Cf. *Dee, supra*, 106 Cal.App.4th at p. 36 [supervisor's remark to employee of Filipino descent, "'it is your Filipino understanding versus mine'" was "ethnic slur, both abusive and hostile"].) Besides being occasional, isolated, and sporadic (*Aguilar, supra*, 21 Cal.4th at p. 131), the two co-workers' comments to her on two occasions in 2007 and 2008 are not "racial comments by superiors."

Also as limited by her responses to Blue Cross's separate statement, Strong's claim for harassment is based on two e-mails she received in November 2006, since only those e-mails contained what she characterizes as "racial epithets." In mid-November, Strong received a spam e-mail, which contained the word "ghetto" in the subject line. She reported it on December 4. On November 30, she received and immediately reported an e-mail titled "Prom Day in the Hood," which consisted of a string of photographs of African-Americans, accompanied by offensive commentary. Nicole Lurie of Blue Cross's HR department investigated. The spam e-mail was sent from an external address, and the IT department was asked to block e-mails from that address. Disciplinary action was taken against the temporary worker and Blue Cross employees involved in forwarding the "Prom Day in the Hood" e-mail; they were required to sign final corrective actions in mid-December 2006 to early January 2007. The Blue Cross employees were precluded from applying for promotions.

Strong argues that this remedial action by Blue Cross was neither prompt nor effective because on December 7, 2006, she received another e-mail from the person who had forwarded the "Prom Day in the Hood" e-mail to her. She acknowledges that the December 7 e-mail, although not work related, had no racial content. Since there is no evidence that Strong continued to receive objectionable race-related electronic mail, she cannot establish that the actions Blue Cross took were inadequate.[11]

Blue Cross was entitled to summary adjudication of the harassment cause of action.

IV

A violation of FEHA may support a claim for unlawful business practices. (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 401.) Since Strong's cause of action for unlawful business practices under Business and Professions Code section 17200 et seq. rests on the same facts as her FEHA claims, it fails for the same reasons as those claims.

Since no triable issue of material fact exists as to any cause of action, summary judgment for Blue Cross was proper.

DISPOSITION

The judgment is affirmed. Blue Cross is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J. SUZUKAWA, J.

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[11] Two other spam e-mails Strong received in December 2006 and December 2007, respectively, had no race-related content. The first had the phrase "motormouth shopping bag lesbianism derby" in the subject line; the second, which Strong did not report, was an advertisement for penis enlargement.